

## Dissenting Statement of Commissioner Gloria Tristani

IN THE MATTER OF INDUSTRY GUIDANCE ON THE COMMISSION'S CASE LAW INTERPRETING  
18 U.S.C. §1464 AND ENFORCEMENT POLICIES REGARDING BROADCAST INDECENCY, EB  
FILE NO. 00-IH-0089

I dissent from the issuance of this "Policy Statement" (hereinafter "Statement") for three reasons. First, the Statement creates a false impression that it satisfies an obligation assumed by the Commission in 1994. Second, the Statement perpetuates the myth that broadcast indecency standards are too vague and compliance so difficult that a Policy Statement is necessary to provide further guidance. Most importantly, this Statement diverts this Agency's attention and resources away from the ongoing problem of lax enforcement, which is a pressing concern of America's citizens.

The Statement notes that on February 22, 1994 the Commission entered into a Settlement Agreement with Evergreen Media Corporation (hereinafter "Agreement").<sup>1</sup> At fn 23 the Statement cites the terms of the Agreement as the source of our obligation to produce this Statement:

Specifically, in paragraph 2(b) of the settlement agreement, the Commission agreed to "publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency."<sup>2</sup>

The Agreement actually imposed a significantly more restricted obligation.

*Within nine months of the date of this Agreement, the FCC shall publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency.*<sup>3</sup>

Six and one half years later, it is clear the FCC did not observe the terms of the Agreement. While I cannot support the FCC's failure to comply with the timeline set forth in the original Agreement, the record does not disclose a single effort by Evergreen to seek specific performance under the Agreement. It is well settled that "equity aids the vigilant, not those who slumber on their rights," and doctrines such as laches are designed to promote diligence and prevent enforcement of stale claims.<sup>4</sup> The public interest is not served by permitting Evergreen to sit silently on the sidelines while Commission after Commission failed to act. Even if the FCC shirked its duty under the Agreement, as long as Evergreen retained the benefit of dismissal of indecency cases against it as set out in the Agreement, a strong case exists that Evergreen ratified this agency's inaction for

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<sup>1</sup> See *United States v. Evergreen Media Corp.*, Civ. No. 92 C 5600 (N.D. Ill., E. Div. 1994).

<sup>2</sup> See *Policy Statement* at p. 17-18, n.23.

<sup>3</sup> See *Settlement Agreement* at p. 3.

<sup>4</sup> See e.g. *Powell v. Zuckert*, 366 F.2d 634, 636 (D.C.Cir.1966).

almost 7 years.<sup>5</sup> If Evergreen Media Corporation had an enforceable interest in the Agreement, it has long since been waived.

Moreover, the obligation to issue the Statement was subject to several conditions precedent that bound Evergreen Media.<sup>6</sup> The Statement itself does not disclose whether Evergreen complied with its obligations, and with the exception of noting payment of \$10,000 forfeiture, the record on file at the Commission is silent on the same point. FCC Mass Media Bureau records disclose that Evergreen Media no longer owns the license to which the Agreement's terms attached. Finally, the Agreement does not bind the Commission to provide to Evergreen's assigns the relief set forth in the Agreement.<sup>7</sup> In the absence of the party executing the Agreement, and no successor to accede to those interests, it appears there is no extant legal duty or enforceable right upon which the issuance of the Statement can be based.

I turn next to the underpinnings of the need for this statement. The Statement provides:

The Commission issues this Policy Statement to provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect to broadcast indecency.<sup>8</sup>

First, settlement of a case involving a single licensee should not compel the FCC to adopt our most significant industry-wide Policy Statement on this subject, particularly when doing so does not serve the public interest. Second, there is nothing in the record demonstrating that Evergreen Media failed to understand the FCC's, or the U.S. Supreme Court's, cases on broadcast indecency. In fact Evergreen agreed to issue to its employees a "policy statement" that was to be based upon "the FCC's definition of broadcast indecency."<sup>9</sup> It is difficult to understand how Evergreen could both issue a policy statement containing the FCC's definition of indecency to its employees *and* simultaneously be unable to understand the FCC's definition. But leaving that quirk aside, there is simply no proof that broadcast licensees are in need of this Policy Statement. No factual basis exists for concluding that confusion about the standards or overreaching enforcement by the FCC requires this Statement.

Moreover, I am aware of no rush of inquiries by broadcast licensees seeking to learn whether their programs comply with our indecency caselaw. In the absence of such

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<sup>5</sup> See e.g., *Buffum v. Peter Barceloux Co.*, 289 U.S. 227, 234 (1933).

<sup>6</sup> The Agreement provides the parties exchanged "consideration and mutual promises hereinafter stated." See *Settlement Agreement* at p. 2. The Agreement describes, at Para. 3, several actions to be undertaken by Evergreen. The Agreement is a form of an executory contract the terms of which require timely satisfaction to constitute compliance. Failure by either party to perform would make the Agreement voidable or unenforceable.

<sup>7</sup> See *Settlement Agreement* at p. 4.

<sup>8</sup> See *Statement* at p.1.

<sup>9</sup> See *Settlement Agreement*, at p. 3.

requests, this Policy Statement will likely become instead a “how-to” manual for those licensees who wish to tread the line drawn by our cases. It likely may lead to responses to future enforcement actions that cite the Statement as establishing false safe harbors. In the absence of proof that the Statement addresses concerns supported by the FCC’s history of enforcement, or the record of the Evergreen case, the Statement is nothing more than a remedy in search of a problem. It would better serve the public if the FCC got serious about enforcing the broadcast indecency standards. For these reasons, I dissent.